NOS._____ and _____ (CONSOLIDATED)

United States of America

Before the
Department of Commerce

WEAVER'S COVE, ENERGY, LLC,

Appellant,

v.

MASSACHUSETTS OFFICE OF COASTAL ZONE MANAGEMENT,

Respondent.

MILL RIVER PIPELINE, LLC,

Appellant,

v.

MASSACHUSETTS OFFICE OF COASTAL ZONE MANAGEMENT,

Respondent.

RESPONDENT'S RESPONSIVE SUPPLEMENTAL BRIEF TO APPELLENANTS' JOINT INITIAL SUPPLEMENTAL BRIEF AND JOINT REQUEST FOR SUPPLEMENTATION OF THE CONSOLIDATED RECORD

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL REGULATIONS AND RULES

INTRODUCTION

In response to a supplemental briefing schedule that allowed the parties to submit a 15-page initial supplemental brief, Appellants filed 39-pages. Appellants also proposed including in the Decision Record another 1,100 pages, yet offered no justification for the late-timing of its proposal in light of the fact that the vast bulk of these newly-proffered pages (*i.e.*, all but 78 pages) pre-date commencement of these appeals.

The Secretary would be well-justified in disregarding Appellants' noncompliant, excessive brief and the bulk of the proffered items, which do not satisfy the regulatory criteria or otherwise present new arguments or information.[1] *See* 15 C.F.R § 930.127(b) (limiting *opening* briefs to 30 pages and replies to 15 pages); 15 C.F.R §930.127(g) (Secretary may enlarge briefs "for good cause"); 15 C.F.R §930.127(e)(4) (Secretary may disregard briefs not requested or required"). Certainly, in light of the short time allowed for filing a reply to these submissions, disallowing these excessive submissions would help ensure efficiency and particularly fairness to MCZM. Be that as it may, however, these submissions simply reiterate arguments or present cumulative information; nothing contained in Appellants' supplemental brief or newly-proffered documents is sufficient to satisfy their still unmet burden of proof as to Grounds I or II.

[1] In calling for additional briefing, the Order of January 2, 2008 specified that "Briefs shall not exceed 15 double-spaced pages." Letter Order of Jane C. Luxton, General Counsel, dated January 2, 2008, at 2. (Likewise, the order restricts reply briefs to ten pages.) The subsequent two orders addressed the timing and scope of the supplemental briefing, but did not purport to enlarge (let alone eliminate) the page limit. *See* Letter Order of Jane C. Luxton, General Counsel, dated January 10, 2008, at 1; Letter Order of Jane C. Luxton, General Counsel, dated February 22, 2008, at 3. Indeed, Appellants' January 9, 2008, request for leave to file additional briefing "if the Secretary elects to supplement" the record with the MassDEP rulings, implicitly acknowledges the continuing force of the page limit. *See* "Joint Answer in Opposition of Weaver's Cove Energy, LLC and Mill River Pipeline, LLC in Response to Respondent's Motion to Supplement the Consolidated Record and Stay the Briefing Period," at 4.

ARGUMENT

I. EVEN IF THE SECRETARY ACCEPTS APPELLANTS' NONCOMPLIANT BRIEF, APPELLANTS STILL FAIL TO MEET THEIR BURDEN OF PROOF WITH RESPECT TO GROUND I OR II.

Appellants attempt to dismiss the significance of the LOR (Appellants' Supp. Br. at 1-10) primarily by reiterating their attorneys' *post hoc* argument that "vessel transit activities under review by the USCG were *not* before MCZM" and are, therefore, outside the scope of the Secretary's review here. *See* Appellants' Supp. Br. at 4 (emphasis in original). For the reasons set out in MCZM's Supplemental Brief, at 6-8, this argument is in direct conflict with Appellants' own prior filings with MCZM, which placed their vessel transit plan, and the changes to the vessel transit plan, squarely before MCZM. *See* MCZM Supp. Br. at 6-8.

Appellants' only other argument with respect to the LOR (*i.e.*, that consideration of impacts from LNG tankers transiting the Taunton River will have no cumulatively significant effects when considered with other Project impacts, under Ground I, Element 2 [*see e.g.*, Appellants' Supp. Br. at 2-3, 6-10]), entirely misses the import of the LOR: as a practical and regulatory matter, the Project is not feasible: on the current record, tankers are prohibited; there is no means of fuel delivery to the proposed terminal or pipeline; and none of the touted benefits to national interest can or will be accomplished *See* MCZM Supp. Br. at 4-6. The operational project that Appellants want the Secretary to consider is a figment of Appellants' wishful-thinking, wholly unsupported by the reality of the Record (for all its volume). *Id.*at 5.

Regarding Appellants' dismissive treatment of the MassDEP Rulings, the brevity of their argument speaks volumes: Appellants devote only a single paragraph, out of their entire 39-page brief, to the MassDEP Rulings. Appellants' Supp. Br. at 38-39. Appellants attempt to dismiss

the MassDEP Rulings as being irrelevant because the Secretary conducts his review "*de novo.*" *Id.* at 39. Again, Appellants' argument wholly misses the point. MCZM does not contend that the Secretary should "determine whether the appellant secured all necessary permits for its project," as Appellants incorrectly contend. Appellants' Supp. Br. at 39. Rather, the MassDEP deficiency letters demonstrate several key points. They show the integral connection between the identification of the parameters of the LNG tankers for which the proposed dredging is being conducted and the ability of MassDEP to evaluate and analyze whether, or how, the applicable regulatory performance standards could be met. *See* MCZM Supp. Br. at 8-13. This confirms that MCZM's objections, based on outstanding, required state permits, were wholly justified and not the result of recalcitrance. *See* MCZM Supp. Br. 13. The MassDEP Rulings also confirm MCZM's arguments that significant missing factual information that posed an obstacle to its review also prevents the Secretary from conducting the balancing he is required to perform. *See e.g.,* MCZM Br. 17; MCZM Supp. Br. 12.

Notably, Appellants' do not even try to resuscitate their claim that Ground II is met. *See* Appellants Supp. Br. at 1-39. In light of the negative finding on Ground II offered by the Department of Defense (*i.e.*, that it is "not aware of any national defense or other national security interest that would be significantly impaired if the project is not permitted to go forward as proposed," SSA 162), Appellants are wise not to have continued to pursue this errant claim.

Finally, having offered no new arguments that would undercut the power of MCZM's arguments with regard to the LOR, Affirmance, MassDEP Deficiency letters, or DOD's or others' Comment letters, Appellants focus the bulk of their initial supplemental brief on presenting a 25-page rebuttal to Fall River's *amicus* brief. Here again, however, where

Appellants cannot substantively refute the valid arguments presented, they instead set out to re-characterize them and then dispel arguments not being made.

For example, Fall River does not argue – as Appellants contend it does – that "the conditional nature" (Appellants' Supp. Br. at 11) of FERC's approval of the Project is what prevents a Secretarial override. *See also id*. at 15. Fall River does not argue that each and every condition of FERC's conditional approval order must be satisfied before the Secretary can consider the benefits of a fully functional, operational Project. *Id.* at 15 (arguing that the Secretary should conduct his review based on consideration of the Project "if constructed and operating as proposed, *regardless of ongoing review by other permitting agencies*") (emphasis added). Fall River's point is, straightforwardly, as FERC itself has noted, is that not all conditions are created equal.

In evaluating the CZMA criteria as to whether an activity is consistent with the objectives or purposes of the CZMA, certain *threshold* conditions – as recognized by FERC – cannot be ignored or assumed away, especially in light of a negative finding by the lead federal permitting agency. Rather, the Secretary should consider, in evaluating the CZMA criteria as to whether an activity is consistent with the objectives or purposes of the CZMA, the fact that FERC itself recognized significant *threshold* concerns regarding the viability of the Project, including the suitability of the waterway (*see* Rehearing Order at ¶ 44) and its adverse impact on the coastal environment, which were not resolved during its review and preparation of the FEIS. *See* WCA Tab 3, (Conditional Approval Order) at ¶ 106; WCA Tab 4 (Rehearing Order) at ¶ 18. As a result, FERC unequivocally noted that absent successful resolution of these threshold matters, the Project was not viable. WCA Tab 4, at ¶ 109 (imposing conditions precedent "thereby

ensuring that the project will not proceed until there is satisfactory resolution of any remaining factors that could alter our finding"); *see also Fall River v. Fed. Energy Regulatory Comm'n*, 507 F.3d 1, 7 (1st Cir. 2007) (review unripe because "WCE's proposed LNG project may well never go forward because FERC's approval of the project is expressly conditioned on approval by the USCG [United States Coast Guard] and the DOI [United States Department of Interior]"). To date Weaver's Cove has not satisfied many of these *threshold* conditions, and therefore cannot meet its burden of proof in this proceeding.[2]

Specifically, Weaver's Cove cannot show that it will ever be able to satisfy the approval requirements of the U.S. Coast Guard, the Department of Interior, the Army Corps of Engineers, or compliance with the Clean Water Act § 401 state water quality certifications.

Notwithstanding the quantity of pages and repetitious argument proffered by Appellants, the bottom line remains that LNG tankers are prohibited from reaching the proposed terminal. In addition, Appellants have not shown that the appropriate federal and state resource agencies have approved the proposed mitigation plan or the proposed dredging plans (including the timing of dredging).[3] Nor could they, as these plans remain mere unsanctioned proposals and simply do not bear the weight Appellants attempt to place on them.

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[2] Weaver's Cove's reliance on *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 17 (2d Cir.1997) for the proposition that the Secretary can assume for purposes of his analysis that these conditions will be implemented is misplaced because these are not merely ordinary FERC conditions requiring identified mitigation measures. As described in Fall River's *amicus* brief, these matters impact the viability of the Project, including whether it can ever be shown to be consistent with the objectives and purposes of the CZMA.

[3] Weaver's Cove's claims that "the Mitigation Plan has *not* been rejected by the EPA or NMFS" (Br., p. 31, emphasis added) is an exercise in semantics. Weaver's Cove has proposed several mitigation plans since the Project permitting began, each time being sent back to the drawing board by the relevant federal and state resource agencies. So while the latest plan, dated October 25, 2006, has not been "rejected" *per se*, it has also not been accepted either.

Moreover, Appellants' reliance on the Secretary's *de novo* review as a basis to ignore the actions of other federal and state agencies is misguided. *De novo* review under the CZMA means "the Secretary does *not* review the substantive basis for the State's decision." Final Rule on Federal Consistency, 71 Fed. Reg. 788, 822 (Jan. 5, 2006). Rather, he "independently review[s] the proposed activity to determine its consistency with the CZMA." Final Rule on Federal Consistency, 65 Fed. Reg. 77124, 77150 (Dec. 8, 2000). In conducting this review, the Secretary rightfully considers the views of other expert agencies. *See* Final Rule on Federal Consistency, 65 Fed. Reg. at 77151 ("NOAA will continue to seek the views and comments of the expert agencies charged with implementation of these statutes."); *see also* 15 C.F.R. § 930.129(a)(4) (denial by a federal agency of a required federal license or permit is grounds for dismissal of the appeal). To argue that *de novo* review allows the Secretary to conduct his review of Grounds I and II in a vacuum, isolated and apart from critical, threshold federal and state agency determinations, is untenable and should be rejected. *See* MCZM Br.17-20; MCZM Supp. Br. 12.

II. APPELLANTS' JOINT REQUEST TO ADD OVER 1,100 PAGES INTO THE DECISION RECORD – AT THIS LATE STAGE – ALSO FAILS TO PRESENT ANY NEW INFORMATION THAT WOULD SATISFY THEIR BURDEN OF PROOF WITH RESPECT TO GROUND I OR II, BUT RATHER OFFER ONLY REPETITIOUS, CUMULATIVE AND CONCLUSORY MATERIALS.

The Secretary enjoys wide latitude in determining the content of the appeal Decision Record (15 CFR §930.127(e)(1)); and Appellants' joint request to supplement the record endeavors to have the Secretary explore its outermost reaches. Appellants purport to offer seven documents; however, these seven documents are comprised of more than 1,100 pages, all but 78 pages of which pre-date commencement of these appeals.

Other than the text of Appellants' appeal of the LOR and Affirmance (*i.e.*, Document No. 7, excluding the more than 800 pages of exhibits), these items are neither new nor previously unavailable. Appellants offer no reason for waiting until this late time to propose inclusion of these voluminous items into Record; rather, it appears that they were simply loath to pass-up the Secretary's invitation to propose additional documents.

Given the limited timing,[4] MCZM has been unable to review and analyze the newly-proffered materials and prepare a tailored, substantive response. Rather, in these circumstances, MCZM has relied upon Appellants' descriptions of the proffered documents and their reasons for offering them. Thus, even based only on Appellants' descriptions, which presumably would describe these items in the most favorable light to Appellants, none of the voluminous, newly-proffered materials pages would be sufficient to show that Appellants have met their burden with regard to Ground I or II.

In fact, the pages offered are not even "clarifying information;" but, based on Appellants' descriptions, are merely duplicative or cumulative information that simply restates similar, insufficient generalities and conclusions that are already in the Record. Nothing in Appellants' request would be sufficient to demonstrate Ground I or II has been met.

CONCLUSION

For the foregoing reasons, and as set forth in detail in MCZM's opening and supplemental briefs, the Secretary should decline to override MCZM's objections.

[4] MCZM received the box with the proffered documents just before the close of business on Tuesday, March 18, 2008, which left just *three days* before its response was due to review and analyze them and prepare this response.

Respectfully submitted,

MASSACHUSETTS OFFICE OF
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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2008, I served the foregoing Respondent's Responsive Supplemental Brief by first-class mail, postage prepaid, and sent courtesy copies by email to the following:

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